

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Land Protection and Revitalization

Subject: Division of Land Protection and Revitalization Guidance Memo No. 04-2011
Financial Assurance for Stockpiles of Materials for Beneficial Use or Other Uses

To: Solid Waste Facility Owners and or Operators, Regional Land Protection and
Revitalization Managers

From: Jeffery A. Steers, Director, Division of Land Protection and Revitalization
Leslie D. Beckwith, Director, Office of Financial Assurance

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Summary:

Certain solid waste facilities are allowed to "stockpile" certain materials on site for beneficial use, constructions projects, or other uses. While these materials may be excluded as a solid waste under 9 VAC 20-81, they pose the same environmental risk if the facility owner or operator is unable to properly close the facility. In order to assure that the costs associated with protecting the public health and safety from the consequences of abandonment or failure to properly execute closure and post-closure care at a facility are to be recovered by the owner or operator, the owner or operator of such facility shall obtain additional financial assurance for those materials kept on site.

Electronic Copy:

An electronic copy of this guidance is available on DEQ's website at
<http://www.deq.virginia.gov/>.

Contact Information:

Leslie Beckwith leslie.beckwith@deq.virginia.gov
Kathryn Perszyk kathryn.perszyk@deq.virginia.gov

Disclaimer:

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Regulatory and Statutory Authority:

Two regulations provide the authority for this guidance. The Virginia Financial Assurance Regulations for Solid Waste Transfer, Disposal, and Treatment Facilities, 9 VAC 20-70 (the FA Regulations) and the Virginia Solid Waste Management Regulations, 9 VAC 20-81 (the VSWMR). The Statutory authority for this guidance comes from the Waste Management Act, §10.1-1410.

Discussion:

The FA Regulations specify that the amount of financial assurance (FA) is derived and determined from the cost estimate for closure of the facility. The FA Regulations provide that closure shall ensure the facility is closed “in a manner that minimizes the need for further maintenance; and controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, the post-closure escape of uncontrolled leachate, surface runoff, or waste decomposition products to the groundwater, surface water, or to the atmosphere.”

Also important, Section 111 of the FA Regulations states that the cost estimate must “equal the cost of final closure at the point in the facility's active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan.” Also, it goes on to state “[t]he closure cost estimate may not incorporate any salvage value that may be realized by the sale of wastes, facility structures or equipment, land or other facility assets at the time of partial or final closures.”

The fact that certain “materials” may be exempted or excluded from regulation as a solid waste does not affect the impact these materials may have on closing a solid waste management facility where they are handled, managed, or stockpiled at a solid waste management facility since FA requires the cost to close the entire facility, regardless of the materials or waste on-site. Furthermore, the Department will not consider that this material may have a “salvage value” or some possible beneficial use or value as cost-estimates are based upon the cost of disposing, capping, and closing at the facility; not redeeming any value or potential profit for any materials on-site. Furthermore, once a facility is abandoned, as FA contemplates, any material on-site loses its exempted or excluded status because the material is abandoned. If the owner abandons the facility, there can be no legitimate claim that he/she will return to attempt to sell or use these materials. This is also true for speculative accumulation which contemplates an active operation in which the inventory must be turned over. Thus, the cost-estimate, and resulting FA amount, for closing the facility should consider the cost of these materials remaining on-site at the point of closure.

Definitions

“Beneficial Use Determination” or “BUD” means a decision by the Department to allow the use of a solid waste material as a substitute for natural or commercial products in a manner that does not contribute to adverse effects on health or environment. These determinations are based on case-specific information that is provided by the applicant in a beneficial use demonstration containing the information requested under 9 VAC 20-81-97.

"Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste into or on any land or water so that such solid waste or any constituent of it may enter the environment or be emitted into the air or discharged into any waters.

"Disposal unit boundary" or "DUB" means the vertical plane located at the edge of the waste disposal unit. This vertical plane extends down into the uppermost aquifer. The DUB must be positioned within or coincident to the waste management boundary.

"Facility" means solid waste management facility unless the context clearly indicates otherwise.

"Materials" means a solid waste that has a beneficial use as identified in 9 VAC 20-81-95, the facility's permit, or other facility specific correspondence issued by the department.

"Site" means all land and structures, other appurtenances, and improvements on them used for treating, storing, and disposing of solid waste. This term includes adjacent land within the facility boundary used for the utility systems such as repair, storage, shipping or processing areas, or other areas incident to the management of solid waste.

"Solid Waste Management Facility" or "SWMF" means a site used for planned treating, storing, or disposing of solid waste. A facility may consist of several treatment, storage, or disposal units.

"Stockpile" means a pile or storage location for materials to be used at a future date.

"Vertical design capacity" means the maximum design elevation specified in the facility's permit or if none is specified in the permit, the maximum elevation based on a 3:1 slope from the waste disposal unit boundary.

Applicability

This guidance applies to those facilities that store/stockpile materials outside of the landfill footprint area (disposal unit boundary) and have not included the disposal of those materials in its closure cost estimate.

This guidance applies to those facilities that store/stockpile materials within the landfill footprint area (disposal unit boundary) but outside the vertical design capacity or in cells that have yet to be constructed and have not included the disposal of those materials in its closure cost estimate.

This guidance applies to solid waste management facilities such as transfer stations, materials recovery facilities or other types of facilities that are not permitted as a solid waste disposal facility that store/stockpile materials within the facility boundary.

This guidance is not intended to require additional FA for those facilities required to maintain a 3-day stockpile of clean soil or approved alternate material on site for use as daily cover in accordance with 9 VAC 20-81-140.B.1.c. or 140.D.1.c. . This guidance is not intended to require additional FA for those facilities that store materials for beneficial use within a cell that is already constructed but has not reached its design capacity.

This guidance is not intended to require additional FA for storage of materials, specifically

uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil, and rock, that are collected and stockpiled for use in place of conventional aggregate (9 VAC 20-81-95.C.7.n.).

Cost Estimate

The facility owner or operator for each of the applicable facilities named above shall obtain a detailed written cost estimate, in current dollars to load, haul and dispose of any material stockpiled on site. The cost estimate shall also include the cost of contract mobilization, decontamination of site and PE certification if necessary. The cost estimate shall be approved by the department and adhere to the following requirements:

1. The estimate shall equal the cost at the point and time when the facility has the most material on site and would make removal the most expensive.
2. The cost estimate shall be based on the costs to the owner or operator of hiring a third party to remove the material. The third party may not be either a parent or subsidiary of the owner or operator.
3. The cost estimate may not incorporate any salvage value that may be realized by the sale of the material, facility structures or equipment, land or other facility assets at the time of removal. A copy of the cost estimate shall be submitted to the Department.
4. In lieu of a cost estimate, the facility owner or operator may use an amount specified in a third party contract to load, haul and dispose of any material stockpiled on site. The contract shall also include the cost of contract mobilization, decontamination of site and PE certification if necessary. A copy of the contract shall be submitted to the Department.
5. The facility owner or operator shall submit to the Department one or a combination of allowable financial responsibility mechanisms in the amount of the cost estimate or contract.

Financial Assurance Submittal Requirements

The Virginia Financial Assurance Regulations for Solid Waste Disposal, Transfer and Treatment Facilities, 9 VAC 20-70, require submission of documentation that enables the department to verify that financial mechanisms are funded for the closure, post-closure care, and corrective action by owners and operators at their waste management facilities (permitted or unpermitted), as applicable. These regulations establish standards and procedures for financial assurance to be used in the issuance and continuation of permits to construct, operate, modify, close, or provide post-closure care and to be used in the performance of corrective actions or in formulation of enforcement documents issued by the department.

Owners or operators of solid waste management facilities must obtain one or a combination of allowable financial responsibility mechanisms equal to the cost estimate approved by the department using the procedures set forth in 9VAC20-70-111.

In the case of a new BUD or other approval, the cost estimate shall be submitted to the department as part of the application and the selected financial mechanism or mechanisms shall be established within thirty (30) days of the approval.

In the case of facilities with existing BUDs or other approvals the cost estimate shall be submitted within sixty (60) days of the issuance of this guidance. The facility shall provide financial assurance in this new amount within one hundred twenty days (120) of the issuance of this guidance or on the anniversary date of the facility's next annual FA submission whichever is later.

Please reference the fact sheet concerning allowable mechanisms.

ALLOWABLE MECHANISMS:

Type of Mechanism	Description of Mechanism
Trust Agreement	9VAC20-70-150
Surety Bond/ Standby Trust Agreement	9VAC20-70-160
Letter of Credit/ Standby Trust Agreement	9VAC20-70-170
Certificate of Deposit/ Standby Trust Agreement (Not allowed for sanitary landfills.)	9VAC20-70-180
Insurance	9VAC20-70-190
Corporate Financial Test	9VAC20-70-200
Local Government Financial Test	9VAC20-70-210
Corporate Guarantee	9VAC20-70-220
Local Government Guarantee	9VAC20-70-230
Multiple Financial Mechanisms (Mechanisms guaranteeing performance, rather than payment, may not be combined with other mechanisms.)	9VAC20-70-250
Wording of Mechanisms	9VAC20-70-290
Rules to follow when preparing the mechanism	
1. The mechanism must be submitted as a signed, original document to: Office of Financial Assurance, 5 th Floor Virginia Department of Environmental Quality 629 East Main Street, Richmond, VA 23219.	
2. The language of the mechanism must be identical to the wording in 9VAC20-70-290.	
3. The face amount of the mechanism must be equal to or greater than the department approved cost estimate.	

FA Guidance Comments

#	Comment	Response
1	Proposed guidance appears to be regulatory change.	The guidance is not meant to be a regulatory change but is meant to clarify already existing FA requirements.
2	Timeline for compliance is not realistic for existing approvals.	The timeline will be extended for existing approvals.
3	Require additional FA if the 90 day time frame specified in BUD approval is exceeded.	DEQ did not consider this observation.
4	Facilities are not adverse to obtaining additional FA, just don't know how to calculate the costs.	The requirement to have a cost estimate prepared by a third party should help with this concern.
5	Existing SW regulations amply cover any real or perceived concerns regarding the issues outlined in this guidance.	No response.
6	The guidance does not attempt to define materials but defines stockpile as a pile or storage location for materials. Clearly stockpile is simply redundant for the existing regulated SA material or storage.	DEQ has added a definition for "materials".
7	No valid justification for suggesting FA for stockpiled material for legitimate waste disposal facilities, a concept that is recognized in the current regulations.	See comment #1.
8	Guidance is attempting to include those items that are inert or may be beneficially used. As a result the guidance is overreaching and unnecessary.	DEQ has added an exclusion for inert materials.
9	The applicability section of the draft guidance is inconsistent with existing regulations, inconsistent with a facility permit, and most importantly inconsistent with the day-day operational reality of a permitted landfill.	
10	DEQ inspects Rainwater and other landfills four times a year and any environmental risk should be evaluated and acted upon then.	No response needed.
11	Stockpiles of inert material do not have to be hauled away since by definition they have no environmental risk.	DEQ has added an exclusion for inert materials.
12	The cost estimate and removal contract requirement section is impractical,	The requirement to obtain a removal contract is meant to simplify the process

	contrary to operational reality and unworkable.	of having to remove the materials and to obtain accurate costs for doing so.
13	This guidance is good for the industry because it encourages waste facility owners to be more efficient with the waste piles they create under a BUD.	No response needed.
14	We feel that the requirement to obtain and maintain a transferable removal contract is onerous and unnecessary.	Although DEQ considers this requirement as a way to get an accurate cost estimate for removal, a facility may use this option in lieu of a cost estimate.
15	Demonstration of financial assurance in the amount of an approved cost estimate to remove and dispose of stockpiled materials should be sufficient to protect public health and safety from the consequences of abandonment.	DEQ agrees with this comment but may use a removal contract in lieu of a cost estimate.
16	We suggest the term "materials" be specifically defined for the purposes of this guidance.	See comment #6.
17	Golder seeks clarification regarding the extension of the FA regulations to materials previously not required to have financial assurance and specifically how the APA applies to such a regulatory development. The regulations exempt such materials from FA when stored at sites other than solid waste facilities and we believe the same materials and storage should be exempt when located at permitted facilities.	This guidance clarifies that while certain materials may be exempt from the VSWMRs, the FA regulations are aimed at the facility, not the material. Once a facility is abandoned, any material on-site loses its exempted or excluded status because the material is abandoned. Thus, the cost-estimate, and resulting FA amount, for closing the facility should consider the cost of these materials remaining on-site at the point of closure.
18	Since this regulatory action will result in economic impacts to the regulated community we further question why the procedures in the APA are not deemed applicable by the DEQ.	While some facilities may see an increase in the amount of FA, this guidance is a clarification of already existing FA requirements. Some facilities are already demonstrating additional FA for stockpiled materials.
19	Understands our concerns about storing in areas that have reached capacity, but disagrees with the concept that the material has no value that a 3 rd party person could get from selling it should he walk away.	The FA is aimed at the facility, not the material. Additionally, closure and FA are based upon a worse-case scenario and the Department would not consider that the material may have a "salvage value" or some possible beneficial use or

		value or be able to redeem any value or potential profit. Additionally, once a facility is abandoned, there can be no legitimate claim that he/she will return to attempt to sell or use these materials.
20	Concerned about the material he has stockpiled outside the lined area but within the permitted facility would require FA. Currently concrete, treated pilings, and land clearing debris are recycled into aggregate, lumber and mulch. The materials are crushed, milled or ground outside of the lined area but within the facility boundary. He believes recycling activities he does are specifically excluded from permitting.	DEQ has added exclusion for inert materials.